No. 03-1274

Supreme Court, U.S.
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In The

Supreme Court of the United States

JUANITA SWEDENBURG, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* THE BEER INSTITUTE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amicus, The Beer Institute, is the leading trade association for the brewing industry and its suppliers. It is recognized as the authoritative source of information on all aspects of the industry. Since its inception in 1986, The Beer Institute routinely has voiced its members' concerns to Congress and the Court over matters concerning the regulation of the alcohol beverage industry, commercial speech, and responsible consumption.

The Beer Institute's members include domestic and international brewers, who produce 90 percent of the beer consumed in the United States. They directly employ over 400,000 Americans who receive over $13 billion in wages and benefits. For nearly 70 years, The Beer Institute's members have relied on the three-tier distribution system that most States have established to regulate and control the distribution, sale, and consumption of alcohol beverages. The reasonable restrictions in the direct distribution law at issue here are integral to that "unquestionably legitimate" regulatory system. *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion). Accordingly, *amicus* has a strong interest in the outcome of this matter. *Amicus* urges the Court to affirm the decision of the Court of Appeals for the Second Circuit, and hold that New York's direct distribution law is a proper exercise of that State's express powers under the Twenty-first Amendment.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The written consent of the parties to the filing of this brief has been filed with the Clerk of Court.

SUMMARY OF ARGUMENT

This case is about the right of States to regulate the importation of alcohol beverages – a right expressly embedded in the Constitution and federal law. *See* U.S. Const. amend. XXI, § 2; Webb-Kenyon Act, 27 U.S.C.A. § 122 (West 1927 & Supp. 2004). The court below affirmed that right, upholding a New York law that permits out-of-state wineries to ship wine directly to New York consumers provided that those wineries comply with New York's licensing requirement, including a requirement that those wineries have a physical presence in New York, just as in-state wineries must do. *See Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004). The lower court correctly rejected Petitioners' argument that this physical presence requirement ran afoul of dormant Commerce Clause principles by discriminating against out-of-state wineries. *See id.* at 233-37. However, the court did not even have to consider the dormant Commerce Clause because the Twenty-first Amendment's plain language is conclusive.

Petitioners seek to reverse the decision below. They maintain that the direct distribution law violates the dormant Commerce Clause, and that the powers conferred upon the States by the Twenty-first Amendment are insufficient to "save" the law. Petitioners are wrong.

The first step of any constitutional law analysis must be consideration of the express language of the constitutional provision in question. The Twenty-first Amendment expressly gives each State the power to regulate the "transportation and importation" of alcohol beverages for "delivery and use" within that State. U.S. Const. amend. XXI, § 2. New York exercised its express Twenty-first Amendment powers when it enacted its direct distribution

law. As a matter of strict constitutional interpretation, that law is immune from challenge under the dormant Commerce Clause. That should be the end of the analysis in this case.

Furthermore, even if the Court were to review the legislative history underlying the Twenty-first Amendment, it would find that the unequivocal intent was to insulate the States from Commerce Clause challenges when the States exercise their express Twenty-first Amendment powers. Both the events leading up to passage of the Amendment, as well as the statements made by members of Congress at the time they were considering the Amendment, show that the Amendment was drafted for the purpose of eliminating any Commerce Clause impediment from a State's efforts to regulate the alcohol beverage distribution system within its borders.

Consistently, this Court has held that a State's exercise of its express Twenty-first Amendment powers may not be subjected to a Commerce Clause challenge. Petitioners do not and cannot identify a single decision of this Court that contravenes that principle. Rather, every case that Petitioners rely upon involved alcohol beverage regulations that, unlike the New York law in question, were *not* enacted pursuant to a State's express Twenty-first Amendment powers.

Finally, even if the Court were to abandon the literal language of the Twenty-first Amendment, as well as 60 years of its precedent, and instead adopt the new test proposed by Petitioners, the New York statute would still be upheld. According to Petitioners, the statute can only be upheld if it is "closely related" to the purposes of the Twenty-first Amendment, such that Commerce Clause

concerns could be overcome. Here, there can be no doubt that the New York statute is closely related to the purposes of the Twenty-first Amendment. Most significantly, the statute helps to prevent underage drinking by creating a scheme by which the State can enforce its ban on internet sales of alcohol beverages to minors.

This should not be a difficult case. The decision below was mandated by the plain language of the Twenty-first Amendment, as well as an unbroken line of decisions issued by this Court. The Second Circuit's decision upholding the New York statute should be affirmed.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE TWENTY-FIRST AMENDMENT RESOLVES THIS CASE

"In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the *language* of the provision rather than the history behind it." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-107 (1980) (emphasis supplied). The Court has focused on the language of the Twenty-first Amendment because it is clear and unambiguous:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI, § 2.

Petitioners are trying to do precisely what the Twenty-first Amendment prohibits. They are trying to "import" alcohol beverages for "delivery or use" within the State of New York "in violation of the laws" of that State. As such, their challenge to the New York law must be rejected. *See State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62 (1936) (upholding California law that imposed an importation fee on alcohol beverages: "The words used [in the Twenty-first Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes").

As this Court has stated, "[t]he Twenty-first Amendment grants States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal*, 445 U.S. at 110. There can be no doubt that New York's direct distribution law asserts control in precisely those areas. Specifically, the law mandates that wine may be imported into New York by out-of-state wineries, and distributed within the State, only if (i) the wineries obtain a license, which in turn requires having a physical presence or location within the State, and (ii) the wine is imported to that physical location for direct distribution to consumers. *See* N.Y. Alcohol Bev. Cont. Law ("ABC Law") § 100(1) (McKinney's 2000 & Supp. 2004) ("No person shall . . . sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefore required by this chapter"); *id.* § 102(1)(c) ("[n]o alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcohol beverages"); *id.* § 3(37) (out-of-state wineries must "maintain[] a branch factory, office or storeroom within the state of New York and receive wine in this state").

The plain language of the Twenty-first Amendment endorses the validity of statutes – such as the New York law – that regulate the importation and transportation of alcohol beverages. Where, as here, the words of a constitutional amendment are unambiguous, "judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 259 (1992) (citation omitted); *Midcal*, 445 U.S. at 106-107. The Second Circuit's decision should be affirmed based solely on the literal language of the Twenty-first Amendment.

II. PETITIONERS' DORMANT COMMERCE CLAUSE ARGUMENT IS CONTRADICTED BY THE TWENTY-FIRST AMENDMENT'S LEGISLATIVE HISTORY AND RELEVANT PRECEDENT

Notwithstanding the literal language of the Twenty-first Amendment, Petitioners contend that New York's direct distribution law should be struck down under the dormant Commerce Clause. That contention is directly refuted by the legislative history of the Twenty-first Amendment, as well as this Court's Twenty-first Amendment jurisprudence, which make clear that the Twenty-first Amendment removed any dormant Commerce Clause obstacle to state regulation of the transportation and importation of alcohol beverages.

A. The Legislative History Demonstrates that Dormant Commerce Clause Concerns Do Not Trump the Twenty-first Amendment

1. The Nation's Experience Before the Twenty-first Amendment

In order to understand what the Twenty-first Amendment accomplished, it is helpful to consider the

evolution of this Court's case law predating the Amendment. During our nation's first century, the Commerce Clause was not interpreted as a limitation on the States' police powers over the importation and sale of alcohol beverages. *See Craig v. Boren*, 429 U.S. 190, 205 (1976). As Chief Justice Taney wrote in 1847, "I see nothing in the constitution of the United States to prevent [a State] from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper." *The License Cases*, 46 U.S. 504, 577 (1847).

But in 1890, the Court rejected Chief Justice Taney's reasoning as too narrowly construing the reach of the Commerce Clause. *See Leisy v. Hardin*, 135 U.S. 100, 118 (1890). The Court ruled that the Commerce Clause places the power to regulate interstate commerce in alcohol beverages exclusively with Congress. *See id.* Because Congress had not regulated such commerce, the Court reasoned that Congress intended such commerce to remain "free and untrammeled." *Id.* at 109-10. As a result, the Court held that a State could not exercise its police power over any alcohol beverage shipped into the State from outside its borders until that product lost its characteristics as interstate commerce by either removal from its original package or sale. *See id.* at 124-25.

The *Leisy* Court's interpretation of the Commerce Clause made it virtually impossible for States to prevent the importation and initial sale of any beverage alcohol product in its original package. The Court, however, did suggest a solution to this problem:

> [T]he responsibility is upon congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within

> its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.

Id. at 123-24.

Almost immediately after *Leisy*, Congress enacted the Wilson Act, which provided that a State could exercise its police powers over alcohol beverages as soon as the alcohol beverages arrived in that State. *See* 27 U.S.C.A. § 121 (West 1927 & Supp. 2004). The Court upheld the Wilson Act in *Wilkerson v. Rahrer*, 140 U.S. 545 (1891), rejecting an argument that Congress had unconstitutionally delegated its Commerce Clause power to the States. Rather, Congress had "imparted no power to the state not then possessed," but had "simply removed an impediment to the enforcement of the state laws." *Id.* at 564. The Wilson Act, however, proved ineffective because it did not remove the Commerce Clause's impediment to state regulation until after the packages had entered the State. *See Rhodes v. Iowa*, 170 U.S. 412 (1898).

To address the deficiency in the Wilson Act, Congress passed the Webb-Kenyon Act, which was intended "to withdraw the protecting hand of interstate commerce from intoxicating liquors." H.R. Rep. 1461, 62d Cong., 3d Sess. 1 (1913). The language of the Webb-Kenyon Act prefigured Section 2 of the Twenty-first Amendment:

> The shipment or transportation, in any manner or by any means whatsoever, of . . . intoxicating liquor of any kind, from one State, Territory, or District of the United States . . . into any other State, Territory, or District of the United States . . . intended, by any person interested therein, to be received, possessed, sold, or in any manner

> used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States . . . is hereby prohibited.

27 U.S.C.A. § 122 (West 1927 & Supp. 2004). The Court upheld the Webb-Kenyon Act in *James Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917), stating that the Act "took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law." *Id.* at 325. Two years after *James Clark Distilling*, the States ratified the Eighteenth Amendment and ushered in the Prohibition Era. Prohibition lasted until the States ratified the Twenty-first Amendment in 1933.

2. The Amendment's Legislative History

In addition to repealing the Eighteenth Amendment, *see* U.S. Const. amend. XXI, § 1, the Twenty-first Amendment was intended to create an exception to the Commerce Clause whereby States could regulate the importation and transportation of alcohol beverages. As the Court explained in *Craig v. Boren*:

> The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.

429 U.S. at 205-206 (citations omitted); *accord Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984).

The Court's conclusion in *Craig* concerning the Amendment's intent is amply supported by the legislative history of the Twenty-first Amendment. The Resolution that became the Twenty-first Amendment originated in the Senate. Senator Blaine, chairman of the subcommittee that held hearings on the Resolution and floor manager of the Resolution in the Senate, stated that the purpose of Section 2 was "to restore to the States . . . *absolute control* in effect over interstate commerce affecting intoxicating liquors." 76 Cong. Rec. 4143 (1933) (emphasis added). Similarly, Senator Borah, who was known as an "authoritative" advocate of Prohibition, described Section 2 as "incorporating [the Webb-Kenyon Act] permanently in the Constitution of the United States." *Id.* at 4172.

Confirming the intent of the Amendment to withdraw any impediments from the Commerce Clause, the Senate rejected proposed Section 3. That Section provided that "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138 (1933). In urging the rejection of Section 3, Senator Blaine argued that what Section 2 gave the States, Section 3 took away: "Thus [under Section 2] the States are granted larger power in effect and are given greater protection, while under Section 3 the proposal is to take away from the States the power that the States would have in the absence of the eighteenth amendment." *See id.* at 4143; *see also id.* at 4147 (remarks of Senator Wagner) ("if sales may be regulated, so may transportation and manufacture. . . . If that is to be the history of the proposed amendment . . . then obviously we have expelled the system of national control through the front door of section 1 and readmitted it forthwith through the back door of section 3").

After the States ratified the Twenty-first Amendment, Congress reenacted the Webb-Kenyon Act. *See* Act of Aug. 27, 1935, c. 740, § 202(b), 49 Stat. 877. In so doing, Congress made clear that it had withdrawn any Commerce Clause impediment to state laws regulating the distribution of alcohol beverages.

B. Precedent Confirms that the Powers Conferred Upon the States by the Twenty-first Amendment Are Not Constrained by Dormant Commerce Clause Principles

The Amendment's plain language and legislative history notwithstanding, lower court decisions addressing direct distribution laws have turned on interpretations of the Court's Twenty-first Amendment jurisprudence. Those lower courts that have upheld direct distribution laws have correctly understood this Court's decisions as confirming that the States may regulate the importation of alcohol beverages free of any dormant Commerce Clause concerns. *See Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (upholding Indiana direct distribution law), *cert. denied sub nom. Bridenbaugh v. Carter*, 532 U.S. 1002 (2001).

In contrast, those lower courts that have struck down direct distribution laws have incorrectly interpreted this Court's decisions as elevating dormant Commerce Clause principles over the plain text of the Twenty-first Amendment. *See Heald v. Engler*, 342 F.3d 517, 522-23 (6th Cir. 2003) (striking down Michigan direct distribution law; acknowledging the earlier decisions in which "the Supreme Court afforded states broad power to regulate alcohol under the [Twenty-first] Amendment," but stating

that "[a]s early as the 1960s, the Supreme Court signaled a break with [this] line of reasoning"), *cert. granted sub nom. Granholm v. Heald*, 124 S.Ct. 2389 (2004) (Case No. 03-1116) & *Michigan Beer & Wine Wholesalers Ass'n v. Heald*, 124 S.Ct. 2389 (2004) (Case No. 03-1120). *Accord Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003) (striking down Texas direct distribution law); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) (striking down North Carolina direct distribution law); *see also Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002) (reviewing Florida direct distribution law; remanding for further fact finding). As demonstrated below, the Courts of Appeals for the Fourth, Fifth, Sixth, and Eleventh Circuits mistakenly relied upon this Court's cases that – unlike the instant case – did not involve exercises of state powers squarely within the Twenty-first Amendment.

1. The Court's Decisions Immediately Following Ratification Recognized that the Dormant Commerce Clause Does Not Trump the Twenty-first Amendment

In the years immediately following ratification, the Court repeatedly held that the Twenty-first Amendment empowered States to regulate the importation and transportation of alcohol beverages into and within their borders, even when doing so offended dormant Commerce Clause principles. For example, in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), the Court upheld a California statute that imposed a $500 license fee for the privilege of importing beer into the State. Relying on the plain language of the Amendment, the Court expressly rejected plaintiffs' argument that the licensing

fee impermissibly discriminated against out-of-state interests:

> The words [of the Twenty-first Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the amendment as saying, in effect: The state may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the amendment, but a rewriting of it.

Id. at 62.

This Court's cases that followed *Young's Market* reiterated that, when States exercise their powers under the Twenty-first Amendment, they are immune from Commerce Clause challenges. *See Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) (upholding Michigan's retaliatory statute prohibiting liquor importation from States that discriminated against beer manufactured in Michigan: "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause"); *Ziffrin v. Reeves*, 308 U.S. 132, 138 (1939) (upholding Kentucky regulation of the production and distribution of alcohol beverages: "The Twenty-first Amendment sanctions the right of the state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause"); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938) (upholding Minnesota law that prevented importation of liquor containing more than 25 percent alcohol unless

liquor was registered with the U.S. Patent Office: "discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic").

Petitioners, apparently realizing that the *Young's Market* line of cases is dispositive here, argue that those cases have been overruled. *See* Pet. Br. at 33 n.22. But this Court continues to cite *Young's Market* and the decisions that followed it, and those cases remain good law today. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-15 (1996) (quoting *Ziffrin*); *North Dakota v. United States*, 495 U.S. 423, 431-32 (1990) (citing *Young's Market*). Certainly, this Court has never suggested that those cases have been overruled in any respect. *Young's Market* and its progeny require an affirmance of the Second Circuit's decision.

2. Contrary to Petitioners' View, this Court's More Recent Decisions Confirm that the Dormant Commerce Clause Does Not Trump the Twenty-first Amendment

Petitioners mistakenly contend that, beginning with the Court's decision in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), the Court has distanced itself from its earlier decisions and held that the Twenty-first Amendment does not override the dormant Commerce Clause. *See* Pet. Br. at 33 & n.22. Although the Court has invalidated laws that regulate in the area of alcohol beverages, none of those cases involved a State's express powers under the Twenty-first Amendment to regulate the "transportation or importation" of alcohol beverages "for delivery or use" within the State. Moreover, in the very cases relied upon by Petitioners, the Court repeatedly has

confirmed that a State is not constrained by the dormant Commerce Clause when it regulates the distribution of alcohol beverages for use within its borders, such as New York has done with its direct shipping law.

Hostetter did *not* involve a State's regulation of alcohol beverages "for delivery or use" within that State. Rather, the Court struck down on Commerce Clause grounds a New York law that prohibited a retailer located at John F. Kennedy Airport from selling alcohol beverages that were "not delivered to the customer until he arrive[d] at his foreign destination." *Id.* at 325; *see id.* at 333 ("Here, ultimate delivery and use is not in New York, but in a foreign country"). The New York law conflicted with a federal agency's approval of the retailer's proposed method of operations. *See id.* at 326.

This Court held that New York's law was not an exercise of the State's express powers under the Twenty-first Amendment:

> The State has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. . . . Rather, the State has sought totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do.

Id. at 333-34. Because the New York law at issue in *Hostetter* did not fall within that State's express Twenty-first Amendment powers, it could not withstand a Commerce Clause challenge.

More to the point, the *Hostetter* Court itself confirmed that where, as here, a State regulates the importation and transportation of alcohol beverages for delivery or use within that State, the State is not constrained by the dormant Commerce Clause:

> This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. . . . This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned.

See Hostetter, 377 U.S. at 330-31. Thus, far from undermining *Young's Market* and its progeny, *Hostetter* confirmed the holding of those decisions.

Petitioners fare no better with the other decisions upon which they rely for their misguided notion that this Court has abandoned the literal language of the Twenty-first Amendment. *See* Pet. Br. at 33-36. Those decisions do not involve laws regulating the "transportation or importation" of alcohol beverages. For example, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court upheld a Sherman Act challenge to California's liquor resale price maintenance statute. In so doing, the Court acknowledged that the challenged statute was not enacted pursuant to the State's express Twenty-first Amendment powers. *See id.* at 111-14.

Moreover, the Court reiterated that when a State does pass a law pursuant to its express Twenty-first Amendment powers, that law cannot be subjected to a Commerce Clause challenge. The *Midcal* Court stated:

> The Twenty-first Amendment grants the States *virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system*. Although states retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations.

Id. at 110 (emphasis added). The Court concluded that the California statute was not so closely connected to the importation and distribution of alcohol beverages such that it could trump the federal government's interest in enforcing a "national policy in favor of local competition." *Id.* Here, in contrast, New York's law plainly falls into the areas of importation and distribution – the areas in which the States have "virtually complete control."[2] *Id.*; *see* Point I, *supra*.

The same point was made again in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), another case mistakenly relied upon by Petitioners. At issue was an Oklahoma statute that required cable service providers to

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[2] The instant case does not involve the category of "other liquor regulations" described in *Midcal*, and so there is no need to decide what test should be applied by the courts when such a regulation conflicts with the Commerce Clause. Based on *Midcal*, it appears that some sort of balancing test should be applied, which would acknowledge that, even when States are not exercising their express Twenty-first Amendment powers, the Amendment imparts heightened powers (relative to the Commerce Clause) for regulating in the alcohol beverage area.

delete all advertisements for alcohol beverages contained in the out-of-state signals they transmitted to their Oklahoma customers. The Court stated:

> The central question presented in [*Hostetter* and *Midcal*] is essentially the same as the one before us here: whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.

Id. at 714; *see also id.* at 713 ("we have held that when a state has not attempted to directly regulate the sale or use of liquor within its borders – the core § 2 powers – a conflicting exercise of federal authority may prevail"). The Court voided the broadcasting ban, concluding that it was not closely related to the powers conferred on the States by the Twenty-first Amendment to regulate importation or sale of liquor. *See id.* at 715. But, as with *Hostetter* and *Midcal*, the Court confirmed that when a State regulates within the literal terms of the Twenty-first Amendment, the State is acting with full authority. *See Crisp*, 467 U.S. at 712 ("The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquors within their borders. . . . Indeed, '[t]his Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause'") (quoting *Craig*, 429 U.S. at 206).[3]

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[3] *Accord North Dakota v. United States*, 495 U.S. 423, 431 (1990) (plurality opinion) (upholding North Dakota's reporting and labeling regulations as a valid exercise of that State's Twenty-first Amendment

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Petitioners also mistakenly rely on a line of cases in which the Court struck down liquor price affirmation statutes under the Commerce Clause. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 585 (1986) (striking down New York statute that required liquor distillers to sell to wholesalers at a price no higher than the lowest price the distiller charged wholesalers anywhere else in the United States); *Healy v. Beer Inst.*, 491 U.S. 324, 341-42 (1989) (striking down Connecticut statute that required out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers were, as of the moment of posting, no higher than the prices at which those products were sold in bordering states). Like *Hostetter*, those cases are inapposite because the challenged statutes regulated sales in other states and, therefore, did not fall within the State's express Twenty-first Amendment powers to regulate within its own borders.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), the last case relied upon by Petitioners, *see* Pet. Br. at 35-37, also did not involve a State's exercise of its express Twenty-first Amendment powers. There, the Court invalidated on dormant Commerce Clause grounds a Hawaii statute that exempted locally-produced liquor from a wholesale tax. *See Bacchus*, 468 U.S. at 265. As in *Crisp*, the Court asked "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the [local] exemption," or, put another way, whether the local

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powers: "within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system") (citing *Midcal*, 445 U.S. at 110).

exemption is "closely related to the powers reserved by the Twenty-first Amendment." *Id.* at 275.

The Court answered these questions in the negative. In what seems almost a visceral reaction to Hawaii's admitted desire to favor a local industry, *see id.* at 266, the Court simply held that "State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276; *see also id.* (noting that the "central purpose of the [Twenty-first Amendment] was not to favor local liquor industries by erecting barriers to competition").

In stark contrast to Hawaii's statute, New York's direct shipment statute regulates the "importation" of alcohol beverages – a subject matter within the literal language of the Twenty-first Amendment – rather than the taxation of locally-produced liquor. And, unlike Hawaii's statute, which served only economic protectionism, New York's statute is designed to combat the "perceived evils of an unrestricted traffic in liquor," particularly underage consumption. *See* Point III, *infra*. Thus, *Bacchus* is no more helpful to Petitioners than any of the other cases upon which they rely because it, too, did not involve a State's exercise of its express Twenty-first Amendment powers.

Importantly, *amicus* is not suggesting that the States' exercise of their express powers under the Twenty-first Amendment is without limitation. As this Court has held, state regulations of alcohol beverages may be struck down when those regulations conflict with constitutional provisions other than the Commerce Clause. *See, e.g., 44 Liquormart*, 517 U.S. 484 (First Amendment); *Craig*, 429

U.S. 190 (Equal Protection). But even in those cases, the Court described the States' Twenty-first Amendment powers over the "importation of intoxicants" as a "regulatory area where the State's authority under the Twenty-first Amendment is transparently clear." *Craig*, 429 U.S. at 207.

In sum, this Court consistently has held that when a State exercises its express Twenty-first Amendment powers, it is immune from a dormant Commerce Clause attack. Petitioners do not and cannot identify a single decision that contradicts this principle. Indeed, the decisions upon which they rely only serve to reinforce that rule of law, which is dispositive in this case.

III. THE SECOND CIRCUIT CORRECTLY HELD THAT NEW YORK'S DIRECT DISTRIBUTION LAW IS CONSTITUTIONAL

New York's direct distribution law fits squarely within the ambit of the Twenty-first Amendment. It regulates the importation of alcohol beverages into the State for use within the State. *Cf. Crisp*, 467 U.S. 691; *Midcal*, 445 U.S. 97. The law was not passed for the exclusive purpose of protecting the local wine market. *See Swedenburg v. Kelly*, 358 F.3d 223, 237 (2d Cir. 2004) ("[W]e find no indication . . . that the regulatory scheme is intended to favor local interests over out-of-state interests"); *cf. Bacchus*, 468 U.S. 263. It does not regulate commercial activity occurring entirely outside the State. *Cf. Healy*, 491 U.S. 324; *Brown-Forman Distillers*, 476 U.S 573 (1986). And it does not encroach upon rights protected by other provisions of the Constitution. *Cf. 44 Liquormart*, 517 U.S. 484; *Craig*, 429 U.S. 190; *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S.

341 (1964). As such, the Second Circuit correctly held that the New York law – as an exercise of the State's express Twenty-first Amendment powers – withstood Petitioners' dormant Commerce Clause challenge. *See Swedenburg*, 358 F.3d at 238-39; *see also Young's Mkt.*, 299 U.S. at 62.

Further, even if the Second Circuit had needed to consider the dormant Commerce Clause, its decision to uphold the New York statute still would have been correct. As a threshold matter, the New York law does not discriminate against out-of-state wineries and, therefore, does not implicate dormant Commerce Clause concerns. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly . . . without regard to whether the [commerce came] from outside the State"), *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978). The law provides that any alcohol beverages sold to consumers in New York, whether produced within or without the State, must pass through parties licensed by the State Liquor Authority. *See* ABC Law §§ 100(1), 102(1)(c); *Swedenburg*, 358 F.3d at 237-38 ("New York treats wine importers the same as it treats internal sellers").

The record also demonstrates that New York's wine market does not prejudice out-of-state wineries. *See* JA 127 (Affidavit of Howard P. Kitt, dated August 16, 2001) ¶ 78 (evaluating competition in the New York wine market and concluding that, "by any reasonable economic test, the wine market in New York State is one in which competition is open, intense, and effective, and in which access – for both suppliers of wine and consumers of wine – is unimpeded"). In light of New York's nondiscriminatory regulations, Petitioners' argument is revealed for what it

really is: Petitioners simply do not want to comply with New York's regulations.

Putting aside the threshold inquiry, New York's direct distribution law would satisfy the higher burden that, in Petitioners' incorrect view, *see* Pet. Br. at 16-18, *Bacchus* imposes on those state laws that discriminate against interstate commerce. That hypothetical higher burden would require that the interests implicated by the state regulation be "so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail," notwithstanding that the regulation conflicts with federal law. *Crisp*, 467 U.S. at 714.

State regulations that are integral to enforcing that State's liquor laws must be deemed "closely related" to the Twenty-first Amendment. For example, in *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275 (1972), the Court held that a South Carolina regulation that required out-of-state liquor manufacturers to have a representative resident within the State to receive alcohol beverage shipments in-state on behalf of the manufacturer was "unquestionably, reasonably related to the State's purpose" of enforcing the State's ABC law, which was a legitimate Twenty-first Amendment goal. *Id.* at 283 ("By requiring manufacturers to localize their sales, South Carolina establishes a check on the accuracy of these records").[4]

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[4] *See also North Dakota*, 495 U.S. at 432 (plurality opinion) (holding that labeling and reporting requirements were "necessary components" of an "unquestionably legitimate" "regulatory regime" designed to ensure that liquor destined for a federal enclave within a State was not diverted into the State); *Midcal*, 445 U.S. at 107 ("[T]he Amendment gives the States control over the 'transportation or importation' of liquor into their territories. Of course, such control

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As with the regulation at issue in *Heublein*, New York's direct distribution law is integral to enforcing the State's ABC Law. In approving the physical presence requirement that is part of the direct distribution law, the Second Circuit stated:

> Presence ensures accountability. Records of sales and compliance with New York's regulatory requirements must be available for inspection by [State Liquor Authority (the "SLA")] officials. Violations are subject to disciplinary measures carried out in New York, including fines imposed against the bond all license holders are required to post. . . . Requiring New York officials to traverse the country to ensure that direct sales to consumers . . . comply with New York law would render the regulatory scheme useless.

Swedenburg, 358 F.3d at 237-39 (footnote omitted). *See also* JA 161 (Affidavit of Thomas G. McKeon, General Counsel of the New York State Liquor Authority, dated August 17, 2001) ¶ 4 ("If out-of-state wineries . . . are permitted to sell and ship directly to New York consumers – without any licensee – the SLA will lose the ability to investigate and control such shipments, to protect against diversion of wine to unlawful purchasers (such as minors below the drinking age) and to insure that alcoholic beverages sold in this State are not adulterated"); JA 98-101 (Kitt Aff.) ¶¶ 39-42 (stating that out-of-state wineries (*i.e.*, those with no physical presence in New York) have less incentive to comply with New York regulations than in-state wineries). Therefore, as in *Heublein*, the physical

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logically entails considerable regulatory power not strictly limited to importing and transporting alcohol").

presence requirement of New York's direct distribution law is "unquestionably, reasonably related to the State's purpose" of enforcing its ABC Law. 409 U.S. at 283.

Moreover, regulations aimed at promoting temperance also must be deemed "closely related" to the Twenty-first Amendment. *North Dakota*, 495 U.S. at 432 (approving North Dakota regulation that promoted temperance). The New York law clearly promotes temperance among minors. As one expert testified below:

> Unlike out-of-state producers and sellers of alcoholic beverages who are beyond the jurisdiction of New York State regulations, in-state entities licensed by the State Liquor Authority to traffic in alcoholic beverages face civil and criminal sanctions if they fail to comply with New York's alcoholic beverage control laws. . . . If the requirement that all out-of-state alcoholic beverages be imported through in-state licensed wholesalers were to be struck down, the practical means of enforcing the regulations would be lost, and any unlicensed out-of-state producers or sellers of alcoholic beverages would be able to sell to minors with impunity.

See JA 165 (Decl. of Frederick P. Schaffer, dated August 17, 2001) ¶¶ 8, 10. *See also Granholm v. Heald*, Case Nos. 03-1116 & 03-1120, at 9-10, 13 (U.S. Jan. 29, 2004) (brief of *amicus curiae* Michigan Association of Secondary School Principals, *et al.*) (reviewing underage drinking sting operation in Massachusetts, Michigan, and Tennessee that demonstrated the ease with which minors can purchase alcohol beverages sold over the internet without providing proof of age). For this additional reason, even if the dormant Commerce Clause were relevant here, and even if

Petitioners' new "closely related" test were controlling, the Second Circuit correctly upheld the New York statute.

IV. AN AFFIRMANCE OF THE SECOND CIRCUIT'S DECISION WILL PRESERVE THE "UNQUESTIONABLY LEGITIMATE" THREE-TIER DISTRIBUTION SYSTEM

After ratification of the Twenty-first Amendment, the majority of States, including New York, established a three-tier structure to regulate alcohol beverages: alcohol must pass from a producer to a wholesaler, from a wholesaler to a retailer, and from a retailer to a consumer. *See* ABC Law § 102(1)(c)-(d); Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-first Amendment*, 95 Va. L. Rev. 353, 355-56 (1999). The three-tier structure promotes orderly commerce, tax collection, and control (over, for example, distribution to minors). *See* JA 146 (McKeon Aff.) ¶ 10 ("[T]he three-tier system is designed to . . . establish and maintain balanced, orderly markets for the distribution and sale of alcoholic beverages"); JA 152 (McKeon Aff.) ¶ 26 (stating that the three-tier system is intended "to establish a level playing field of evenhanded competition which provides each licensee with a fair opportunity for economic success, but which avoids the public evils caused by destructive competition in the sale of alcoholic beverages"). As the General Counsel of the New York State Liquor Authority has said, "[t]he three-tier system is the critical foundation of the regulatory scheme established by the State in 1934 and continued without interruption ever since." *See* JA 146 (McKeon Aff.) ¶ 10.

This Court has endorsed the three-tier structure. In *North Dakota*, 495 U.S. at 431-33, the Court stated: "In

the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate."

In resolving this case, the Court should do no harm to the longstanding and highly beneficial three-tier system. More to the point, reversal here could threaten this "unquestionably legitimate" structure because the Petitioners challenged not just the physical presence requirement of New York's law that purportedly favors in-state wineries, but the broader, three-tier structure. *See Swedenburg v. Kelly*, Case No. 00 Civ. 778 (RMB) (S.D.N.Y. Dec. 10, 2002); JA 143-44 (McKeon Aff.) ¶ 2 (noting that the plaintiffs challenge ABC Law § 102(a) & (c)).

The Court of Appeals for the Fourth Circuit recently recognized the gravity of such a challenge. *See Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). Although the Fourth Circuit incorrectly held that North Carolina's direct distribution statute violated the dormant Commerce Clause, the court limited its remedy to striking the statutory preference for in-state wineries, while leaving intact the statutory prohibition against out-of-state direct distribution. *See id.* at 517-20. The court held that "when presented with the need to strike down one or more of those laws as unconstitutional, we can assume that North Carolina would wish us to take the course that least destroys the [three-tier] scheme that it has put into place pursuant to its powers under the Twenty-first Amendment." *Id.* at 519.

Consequently, if the Court were to reverse the Second Circuit's decision, it should instruct the lower court to

strike only the provisions of New York's law that purportedly provide an advantage to in-state wineries, rather than strike those provisions that underpin the three-tier structure. In any event, *amicus* submits that the Court should not need to reach that juncture because New York's law is a valid exercise of the State's express Twenty-first Amendment powers.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court affirm the decision of the Court of Appeals for the Second Circuit. Should the Court reverse, *amicus* respectfully requests that the Court direct the lower court to fashion a remedy that does the least harm to New York's three-tier structure of alcohol beverage regulation.

Respectfully submitted,

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